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**Using the Tenth Amendment to Prevent Forest Fires: An Analysis of the Property Clause and Tenth Amendment in *United States v. Board of County Commissioners of County of Otero***

Ryan F. Adragna  
*University of New Mexico - School of Law*

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# USING THE TENTH AMENDMENT TO PREVENT FOREST FIRES: AN ANALYSIS OF THE PROPERTY CLAUSE AND TENTH AMENDMENT IN *UNITED STATES V. BOARD OF COUNTY COMMISSIONERS OF COUNTY OF OTERO*

Ryan F. Adragna\*

## I. INTRODUCTION

In July 2016, residents of Timberon, a small town located on the edge of Lincoln National Forest in Otero County, New Mexico, returned home to find their houses reduced to ashes.<sup>1</sup> They were victims of a forest fire that had quickly spread due to the dry, arid conditions in Otero County.<sup>2</sup> Unfortunately, such scenes are all too common. Wildfires burning throughout the country have become a growing national concern.<sup>3</sup> Time and time again people are forced to evacuate their homes because forest fires, fueled by dry undergrowth, have burned their communities.<sup>4</sup> When a community is faced with such dangers it must protect itself. This same rationale motivated the Board of County Commissioners of the County of Otero to take preemptive measures to thin and clear dangerous dry undergrowth that posed a serious conflagratory threat of causing the same destruction residents of Timberon experienced. Otero County's protective measures, however, were halted by the Federal Government, who used authority granted to it by the Property Clause of the Federal Constitution to assert complete authority over National Forest land in Otero County.<sup>5</sup>

This Case Note will focus on the Tenth Circuit's interpretation of the Property Clause in the recent decision of *United States v. Board of County*

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1. Kayla Root & Katherine Mozzone, *Dozens Evacuate in Otero County, 10 Structures Burned in Fire*, KRQE NEWS 13 (July 13, 2016, 7:15 PM), <http://krqe.com/2016/07/13/fire-burning-100-acres-in-otero-county-10-structures-burned/>.

2. *Timberon Fire 40% Contained, 44 Dwellings Destroyed*, KRQE NEWS 13 (July 15, 2016, 12:18 PM), <http://krqe.com/2016/07/15/timberon-fire-15-contained-forest-officials-confirm-67-structures-lost/1019927290>.

3. See U.S. Dep't of Agric., *Wildfire, Wildlands and People: Preparing for Fire in the Wildland-Urban Interface 1*, <https://www.fs.fed.us/openspace/fote/reports/GTR-299.pdf> (2013).

4. See generally *id.* at 16.

5. This point will be fleshed out in detail below.

*Commissioners of County of Otero*.<sup>6</sup> Part II of this Case Note will summarize the Property Clause and its jurisprudence as used by the Tenth Circuit. Next, Part III of this Case Note will examine the reasoning used by both the district court and court of appeals in deciding *County of Otero*. Part IV of this Note will explore the Tenth Amendment's recent revival. Lastly, Part V of this Note will analyze how the Tenth Amendment not the Property Clause, should have decided *County of Otero*.

#### **A. Facts giving rise to *United States v. Board of County Commissioners of the County of Otero*.**

In the wake of terrible fires originating on federal lands and in response to the continuing fire risks from drought, the New Mexico legislature passed NMSA 1978, § 4-36-11 ("State Law") in 2001.<sup>7</sup> The State Law effectively provided local governments with the authority to enter federal lands in order to thin and clear undergrowth and take other preventative measures to combat the risk of fire.<sup>8</sup> The legislature expressly stated its motive for passing the State Law was the United States Forest Service's inaction in preventing or removing conditions which led to forest fires.<sup>9</sup> In 2011, pursuant to the State Law, the Board of County Commissioners of County of Otero ("Otero County") passed Resolution Number 05-23-11/99-50 ("Resolution") enabling the county to take certain preventative measures to reduce fire hazards within the County, which is comprised of seventy-five percent federal lands.<sup>10</sup>

After Otero County passed the Resolution, the County devised a plan to target certain areas of the Lincoln National Forest that were hazardous and flammable.<sup>11</sup> The County communicated this plan to the United States Forest Service ("Forest Service") and indicated it would carry out the plan with or without the Forest Service's consent.<sup>12</sup> In response the Forest Service communicated their disapproval of the plan and refused to authorize it.<sup>13</sup> Consequently, tension arose between the Forest Service and Otero County, and culminated in the Otero County Sheriff stating that he would arrest any Forest Service officer impeding the County's plan.<sup>14</sup> Small

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6. *United States v. Bd. of Cty. Comm'rs of Cty. of Otero*, 843 F.3d 1208 (10th Cir. 2016), *cert denied*, 138 S. Ct. 84 (U.S. 2017).

7. N.M. STAT. ANN. § 4-36-11 (2001), *invalidated by* *United States v. Bd. of Cty. Comm'rs of the Cty. of Otero*, 184 F.3d 1097 (D.N.M. 2015).

8. *See id.* The law required the State or County to consult with the state forester, but need not require federal approval to be obtained. *Id.*

9. *See id.* ("[B]ecause the United States forest service has failed to exercise its responsibilities as a sovereign to protect the lives and property of the citizens of New Mexico and because it is a fundamental principle under the laws of any just society that the persistent failure of a sovereign to fulfill such obligations constitutes grounds for the forfeiture of jurisdictional supremacy, such a forfeiture must hereby be recognized and declared.")

10. *See County of Otero*, 843 F.3d at 1210.

11. *See United States v. Bd. of Cty. Comm'rs of the Cty. of Otero*, 184 F. Supp. 3d 1097, 1103 (D.N.M. 2015).

12. *See id.* at 1104. The State Law did not require the forest service's consent, but rather a simple consultation with the state forester regarding plans to abate fire hazards. *See* § 4-36-11(C).

13. *See County of Otero*, 184 F. Supp. 3d at 1104.

14. *See id.*

portions of the plan to reduce wild fires were ultimately carried out by the County.<sup>15</sup> However, before the full-scale plan could be executed, the United States brought suit against the State of New Mexico and the County for declaratory and injunctive relief to declare the State Law and the Resolution in conflict with, and thus preempted by, federal law.<sup>16</sup>

**B. An overview of *United States v. Board of County Commissioners of County of Otero*.**

In *United States v. Board of County Commissioners of County of Otero*,<sup>17</sup> the federal appellate case resulting from the United States’ lawsuit, the Tenth Circuit affirmed the decision of The United States District Court for the District of New Mexico, which held that the State Law and Resolution were preempted by federal law. Specifically, the district court held that the State Law and Resolution were preempted by a federal regulatory exception (“Federal Law”) that prohibited “cutting or otherwise damaging any timber, tree, or other forest product in the absence of [federal authorization].”<sup>18</sup> In ruling that Federal Law preempted the statute and ordinance, the district court relied on the proposition that the Property Clause of the United States Constitution<sup>19</sup> granted the Federal Government, through the Forrest Service, plenary power over federal lands.<sup>20</sup> Thus, the issue before the Tenth Circuit was whether “the Property Clause of the Constitution so thoroughly preempt state power that a state may not, *under any circumstances*, remove a deadly and destructive nuisance from National Forrest lands even where the United States refuses or fails to remove that danger itself.”<sup>21</sup> In affirming the district court’s ruling, the Tenth Circuit held that *Kleppe v. New Mexico*,<sup>22</sup> *Wyoming v. United States*,<sup>23</sup> and other binding precedents affirmatively answered that, under the Property Clause, state law must yield to federal law when federal land is at issue.<sup>24</sup>

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15. *See id.* at 1105.

16. *See id.* at 1102.

17. *United States v. Board of Cty. Comm’rs of Cty. of Otero*, 843 F.3d 1208, 1209 (10th Cir. 2016), *cert denied*, 138 S. Ct. 84 (U.S. 2017).

18. 36 C.F.R. §261.6 (1977).

19. U.S. CONST. art. IV, § 3, cl.2. The full text of the Property Clause reads: “The Congress shall have power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to prejudice any Claims of the United States, or of any particular State.” *Id.* In essence, the Property Clause gives the Federal Government legislative power over federal property. *See, e.g.*, *Kleppe v. New Mexico*, 426 U.S. 529, 540 (1976) (holding that Congress has expansive power over federal property pursuant to the Property Clause).

20. *See County of Otero*, 843 F.3d 1208, 1211.

21. *Id.* (emphasis added).

22. *Kleppe v. New Mexico*, 426 U.S. 529 (1976). *See infra* Part III(B) for a detailed explanation of *Kleppe*.

23. *Wyoming v. United States* 279 F.3d 1214 (10th Cir. 2002). *See infra* Part III(C) for a detailed explanation of *Wyoming*.

24. *See County of Otero*, 843 F.3d at 1212–13, 1215.

## II. THE PROPERTY CLAUSE

Article Four, Section Three, Clause Two of the United States Constitution provides: “Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States.”<sup>25</sup> This clause, commonly referred to as the “Property Clause”, grants Congress its primary authority over federal lands, and is the primary authority for the Federal Government’s ownership of land.<sup>26</sup> Through the Property Clause, the Federal Government owns land in all fifty states.<sup>27</sup> In New Mexico alone the Federal Government has title to over 7.7 million acres of land, which equates to roughly thirty-five percent of the land in the state.<sup>28</sup> Despite the broad reach of the Property Clause, the Clause itself has seen little attention in academic commentary.<sup>29</sup> Indeed, the United States Supreme Court has not visited the Property Clause in nearly forty years.<sup>30</sup> While this Case Note does not seek to provide a comprehensive history of the Property Clause,<sup>31</sup> a brief history of the Clause is necessary.

### A. The Property Clause’s origin and early case law.

The Property Clause was ratified along with the rest of the Constitution.<sup>32</sup> The policy underlying the drafting of the Property Clause was the Federal Government’s need to control the anticipated acquisition of western territories.<sup>33</sup> Unlike the Enclave Clause,<sup>34</sup> which yields exclusive jurisdiction to the Federal

25. U.S. CONST. art IV, § 3, cl.2.

26. See, e.g., Peter A. Appel, *The Power of Congress “Without Limitation”: The Property Clause and Federal Regulation of Private Property*, 86 MINN. L. REV. 1, 3 (2001).

27. See CAROL HARDY VINCENT ET AL., *FEDERAL LAND OWNERSHIP: OVERVIEW AND DATA 7–8* (2017), <https://fas.org/sgp/crs/misc/R42346.pdf> (compiling data from the most recent federal reports regarding statistics of federal land ownership).

28. See *id.* at 8.

29. See, e.g., Appel, *supra* note 26, at 6 (“[S]cholars of Constitutional Law have largely ignored the [Property] Clause.”); Allison H. Eid, *The Property Clause and New Federalism*, 75 U. COLO. L. REV. 1241, at 1241 (2004) n.6; (“The Property Clause has garnered very little attention from constitutional law commentators in recent years.”); Peter Peter A. Appel, *The Power of Congress “Without Limitation” in the Twenty-First Century*, 24 PUB. LAND & RESOURCES L. REV. 25, 26 (2004) (“Interest in the Property Clause is surprisingly thin.”); Ronald F. Frank & John H. Eckhard, *Power of Congress Under the Clause to Give Extraterritorial Effect to Federal Lands Law: Will “Respecting Property” Go the Way of “Affecting Commerce”?*, 15 NAT. RESOURCES LAW 663, 664 (1983) (“[T]he Property Clause has received scant attention by the courts and by Congress.”); Cf. ERWIN CHEMERINKSY, *CONSTITUTIONAL LAW* (Rachel E. Barkow et. al. eds, 5th ed. 2017) and KATHLEEN M. SULLIVAN & NOAH FELDMAN, *CONSTITUTIONAL LAW* (Robert C. Clark et al. eds, 19th ed. 2016) (leading constitutional law textbooks lacking any substantive information on the Property Clause).

30. See *Kleppe v. New Mexico*, 426 U.S. 529 (1976) (last Supreme Court decision to cast any meaningful interpretation of the Property Clause); see also Appel, *supra* note 26, at 75 (2001) (“The most recent exposition of the Property Clause from the Supreme Court came in *Kleppe v. New Mexico*.”).

31. For a thorough history of the Property Clause see Appel, *supra* note 26, at 10–79.

32. See generally Robert G. Natelson, *Federal Land Retention and the Constitution’s Property Clause: The Original Understanding*, 76 U. COLO. L. REV. 327, 332 (2005).

33. *Id.* at 359–361.

34. U.S. CONST. art. I, § 8, cl. 17. The Enclave Clause provides that Congress may, with a state’s consensual cession of land, build “Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings.” *Id.* Once land is ceded to the Federal Government, that particular land is subject to the exclusive

Government, the Property Clause was intended to give Congress concurrent jurisdiction over lands within a given state.<sup>35</sup>

Throughout history, the Property Clause's power has been consistently interpreted broadly.<sup>36</sup> Early case law on the Property Clause was no exception. For example, nineteenth century Property Clause jurisprudence set forth that Congress was constitutionally allowed to exercise complete power over newly acquired jurisdictions,<sup>37</sup> lease federal lands to whomever it saw fit,<sup>38</sup> and could regulate private conduct on private property within a state.<sup>39</sup> Indeed, the Property Clause was deemed to give the government undoubtable "power over its own property analogous to the police power of the several States, and the extent to which it may go in the exercise of such power is measured by the exigencies of the particular case."<sup>40</sup> The Court underpinned this approach by stating that anything less would "place the public domain of the United States completely at the mercy of state legislation."<sup>41</sup> Thus, nineteenth century case law on the Property Clause found the clause to have expansive reaches.<sup>42</sup>

The Property Clause would only become stronger as twentieth-century case law not only upheld the Property Clause's broad power, but furthered its reach. In the vast expanses of the west, where federal regulations of land were becoming more frequent, the Property Clause was adjudged to give the United States both rights and authority as proprietor and sovereign.<sup>43</sup> As both proprietor and sovereign the United States can freely exercise Congressional legislation, even if that legislation conflicts

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jurisdiction of the United States. See Spencer Driscoll, *Utah's Enabling Act and Congress's Enclave Clause Authority: Federalism Implications of a Renewed State Sovereignty Movement*, 2012 BYU L. REV. 999, 1000 (2012). Essentially, the Enclave Clause gives Congress the ability to purchase land for government installations (military bases, post offices, etc.) and also grants Congress exclusive control over the seat of the national government (Washington D.C.). *Id.*

35. See Natelson, *supra* note 32 at 359.

36. See, e.g., *Kleppe*, 426 U.S. at 539 ("And while the furthest reaches of the Property Clause have not yet been definitely resolved, we have repeatedly observed that, 'the power over public land thus entrusted to Congress is without limitations.'"); *United States v. Gratiot*, 39 U.S. 526, 537 (1840) (finding that the Property Clause's power "is vested in Congress without limitation.").

37. See *Am. Ins. Co. v. 356 Bales of Cotton*, 26 U.S. 511, 542 (1828) (stating that power to govern United States territories was constitutionally "within the power and jurisdiction of the United States.").

38. See *Gratiot*, 39 U.S. 538 ("The disposal must be left to the discretion of Congress.").

39. See *United States v. Camfield*, 167 U.S. 518, 524 (1897) (finding that the Federal Government could prohibit what were essentially spite fences built on private land to enclose federal land).

40. *Id.* at 525.

41. *Id.* at 526; see also *Utah Power & Light Co. v. United States*, 243 U.S. 389, 390 (1917) (placing emphasis on this quote).

42. The only significant departure from the nineteenth century's broad approach to the Property Clause came in the infamous *Dred Scott* decision, where the Court interpreted the Clause narrowly in order to repudiate Congress' ability to regulate slavery in federal territories. *Dred Scott v. Sandford*, 60 U.S. 393, 497 (1857). The *Dred Scott* court held the Property Clause applied only to "ships, arms, and munitions of war, which then belonged in common to the State sovereignties." *Id.* at 437. This narrow view of the Property Clause was, however, short-lived when *Dred Scott's* holding regarding the Clause was overruled in *Reynolds v. United States*, 98 U.S. 145 (1878).

43. See, e.g., *Light v. United States*, 220 U.S. 523, 536 (1918) (finding that federal grazing regulations in Colorado were constitutionally permissible because under the Property Clause United States has "rights incident to proprietorship, to say nothing of the power of the United States as a sovereign over the property belonging to it.").

with state law.<sup>44</sup> More so, in some instances the United States can freely exercise this power even if that power is exercised on privately owned land. For instance, the Court in *United States v. Alford*<sup>45</sup> held that, through the Property Clause, “Congress may prohibit the doing of acts upon privately owned lands that imperil the publicly owned forests.”<sup>46</sup> In *Alford*, Alford was indicted for violating a statute that mandated he extinguish a fire built entirely on private land.<sup>47</sup> This fire was “near inflammable grass and other inflammable material and timber situated upon the public domain of the United States.”<sup>48</sup> In other words, Alford was convicted for his actions on *private* land because they potentially affected *public* land. The Court used the Property Clause to uphold the statute and Alford’s indictment because the purpose of the statute was “to prevent forest fires” in national parks, and therefore “the danger depend[ed] upon the nearness of the fire not upon the ownership of the land where it is built.”<sup>49</sup> *Alford*’s broad interpretation of the Property Clause is not unique; it stands in a long line of early-to-mid-twentieth century case law which once again reaffirmed that the “power over public lands thus entrusted to Congress is without limitations.”<sup>50</sup>

### B. *Kleppe v. New Mexico*.

The 1976 case of *Kleppe v. New Mexico*<sup>51</sup>—the Supreme Court’s last case directly interpreting the Property Clause<sup>52</sup>—did not depart from the historically broad interpretation of the Property Clause. In fact, *Kleppe* seemingly furthered the reach of the Property Clause to allow for the regulation of wild animals.<sup>53</sup> In *Kleppe*, the Court held that the Property Clause gave Congress expansive powers to regulate federal land and wildlife thereon.<sup>54</sup> The analytical framework behind this holding was central to the Tenth Circuit’s reasoning in *County of Otero*.<sup>55</sup> Because *Kleppe* bore such a significant amount of support for the reasoning in *County of Otero*, an in-depth look at the case is warranted here.

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44. See, e.g., *Hunt v. United States*, 278 U.S. 96, 100 (1928) (finding that forest service agents could shoot deer for federal regulation, even though shooting the deer violated an Arizona hunting statute); *Utah Power & Light Co.*, 243 U.S. at 389 (1917) (“And so we are of opinion that the inclusion of lands within a state of lands of the United States does not take from Congress the power to control their occupancy and use . . . even though this may involve the exercise in some measure of what commonly is known as the police power.”).

45. *United States v. Alford*, 274 U.S. 264 (1927).

46. *Id.* at 266.

47. See *id.*

48. *Id.*

49. *Id.* at 267.

50. *United States v. City and Cty. of S.F.*, 310 U.S. 16, 30 (1940).

51. *Kleppe v. New Mexico*, 426 U.S. 529 (1976).

52. See, e.g., Appel, *supra* note 26, at 75 (“The most recent exposition of the Property Clause from the Supreme Court came in *Kleppe v. New Mexico*.”).

53. See *Kleppe*, 426 U.S. at 546 (“We hold today that the Property Clause also gives Congress the power to protect wildlife on the public lands, state law notwithstanding.”).

54. See *id.* at 539.

55. See *United States v. Bd. of Cty. Comm’rs of Cty. of Otero*, 843 F.3d 1208, 1212–1215 (10th Cir. 2016), *cert denied*, 138 S. Ct. 84 (U.S. 2017).

*Kleppe* centered around a constitutional challenge to the Wild Free-Roaming Horses and Burros<sup>56</sup> Act (“Act”), enacted to protect “all unbranded and unclaimed horses and burros on public lands of the United States from capture, branding, harassment, or death.”<sup>57</sup> Passed pursuant to the Property Clause, Congress enacted the Act to preserve “a thriving natural ecological balance on public lands.”<sup>58</sup> In essence the Act allowed only federal officials to enter onto land to remove wild burros or horses.<sup>59</sup> New Mexico, however did not comply with this portion of the act due to discontent among the State’s ranchers.<sup>60</sup> New Mexico ranchers and their cattle had to constantly compete for range-land resources with other ranchers and also with wild horses and burros who depleted forage and water sources.<sup>61</sup> Ranchers had traditionally found recourse from state laws which would allow the rancher to capture the wild burro or horse,<sup>62</sup> or they could contact local authorities who would quickly remove the wild animals.<sup>63</sup>

Despite New Mexico’s lack of cooperation with the Act, the United States Secretary of the Interior refused to yield, and continued to enforce the Act.<sup>64</sup> Tensions ultimately came to a head when, in direct contradiction to the Act, state authorities entered onto federally-owned land to remove nineteen wild burros which a local rancher had complained of because the burros were eating his cattle’s feed and harassing them.<sup>65</sup> State authorities then further violated the Act by auctioning off those nineteen wild burros.<sup>66</sup> After this auction, the Federal Government asserted jurisdiction over the burros and demanded that the animals be returned.<sup>67</sup> The State of New Mexico refused to comply with this demand, instead filing suit in United States district court seeking a declaratory judgment that the Act was unconstitutional and an injunction preventing enforcement of the Act.<sup>68</sup>

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56. A burro is defined as “a donkey, especially a small one used as a pack animal.” *Webster’s New Dictionary and Thesaurus* at 82 (2d Ed. 2002).

57. *Kleppe*, 426 U.S. at 531 (1976).

58. *Id.* at 531.

59. *See id.* at 532.

60. See Robert L. Fishman & Jeremiah I. Williamson, *The Story of Kleppe v. New Mexico: The Sagebrush Rebellion as Un-Cooperative Federalism*, 83 U. COLO. L. REV. 123, 133 (2011).

61. *See id.*

62. Horses and burros were captured through brutal methods and then sold to be harvested for pet food. See Kenneth P. Pitt, *The Wild Free-Roaming Horses and Burros Act*, 15 ENVTL. L. 503, 506 (accounting the brutal, inhumane manner in which wild horses were captured and killed).

63. *See* Fishman & Williamson, *supra* note 60, at 134.

64. *See Kleppe*, 426 U.S. at 533.

65. *See* Fishman & Williamson, *supra* note 60, at 142.

66. *See Kleppe*, 426 U.S. at 534.

67. *See id.*

68. *See id.*

The district court, sitting in a three-judge panel,<sup>69</sup> conducted an evidentiary hearing and found the Act unconstitutional.<sup>70</sup> The district court viewed the Act as an excessive and impermissible exercise of Congressional power under the Property Clause.<sup>71</sup> The district court further found that: “Congress is here attempting to exercise complete regulation of wild horses and burros whenever found on public land. This conflicts with both the historical interpretation of the [Property] Clause, and the traditional doctrines concerning wild animals.”<sup>72</sup> Following this determination, the case was then appealed to the United States Supreme Court.

At the Supreme Court, New Mexico unsurprisingly argued for a narrow view of the Property Clause. New Mexico sought to first attack the Act by stating the Property Clause afforded Congress two kinds of power: “(1) the power to dispose of and make incidental rule regarding the use of federal property,” and “(2) the power to protect federal property.”<sup>73</sup> Essentially, New Mexico argued that the first power was not broad enough to support the Act<sup>74</sup> and the second power could not be extended to animals because they cannot be considered “public land.”<sup>75</sup> New Mexico next asserted that the Act “infringes on the local sovereignty and legislative authority of the states, and on the states’ powers inherent in their trustee ownership of resident wild animals.”<sup>76</sup> New Mexico couched this second argument in the State’s police powers: “The State, under its stray and other animal laws, and by authority of the United States Constitution, has the responsibility and the inherent police power to regulate and control these horses.”<sup>77</sup> New Mexico was not alone in its wariness of the Federal Government’s intrusion into the traditional provinces of the state. Six amicus briefs were filed for support of New Mexico, including briefs by the Nevada State Board of Agriculture, the Nevada Central Committee of Grazing Boards, the State of Idaho, and the Wyoming Livestock Board.<sup>78</sup> The thrust of those amici’s arguments was that upholding the Act would upset the balance between federal and state governments and would effectively strip the states of their police powers.<sup>79</sup>

These arguments failed to persuade the Court. In a unanimous decision authored by Justice Thurgood Marshall, the Court reversed the three-judge panel’s

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69. This arrangement was “a relic of old federal civil procedure, which provided that a permanent injunction restraining the enforcement of an Act of Congress on grounds of unconstitutionality should not be granted unless heard and determined by a three-judge district court.” Fishman & Williamson, *supra* note 60, at 145 (citing 28 U.S.C. § 2282 (1970) (repealed 1976)). The decision of the three-judge panel could then be—and indeed was—appealed directly to the Supreme Court. *See* Fishman & Williamson, *supra* note 60, at 146 (citing 28 U.S.C. § 1253 (2006)).

70. *New Mexico v. Morton*, 406 F. Supp. 1237, 1238 (D.N.M. 1975), *rev’d sub nom* *Kleppe v. New Mexico*, 426 U.S. 529 (1976).

71. *See id.* at 1239.

72. *Id.*

73. *Kleppe*, 426 U.S. at 536.

74. *See id.* at 535.

75. Answer Brief for the State of New Mexico, et al., *Kleppe v. New Mexico*, 426 U.S. 529 (1976) (No. 74-1488), 1976 WL 181207 at \*13.

76. *Id.* at \*25.

77. *Id.* at \*32–33.

78. *See* Fishman & Williamson, *supra* note 60, at 149.

79. *See* Fishman & Williamson, *supra* note 60, at 149.

finding that the Act was unconstitutional.<sup>80</sup> The *Kleppe* Court's chief reasoning was set forth in two sections: one section addressing whether the Property Clause could validly be used to regulate wildlife on public lands and the other section focusing on the Property Clause's potential intrusion into state sovereignty

The first section rejected New Mexico's narrow reading of the Property Clause. Justice Marshall upheld the Property Clause's tried-and-true broad powers by relying on decided cases that supported an expansive reading of the clause.<sup>81</sup> Consequently, this finding of the Property Clause's broad power easily defeated New Mexico's argument that the Property Clause only gave Congress "(1) the power to dispose and make incidental rule regarding the use of federal property," and "(2) the power to protect federal property."<sup>82</sup> Instead, *Kleppe* unremarkably reasoned that the Property Clause afforded Congress rights as both proprietor and legislator.<sup>83</sup> Through this expansive reading, Congress could easily pass regulation aimed at not only the federal property itself, but also pass legislation pertaining to wildlife living on that property.<sup>84</sup>

Justice Marshall then moved on to New Mexico's next argument that the Act infringed on the state's police power and its traditional sovereign right to control wildlife. In so doing, Justice Marshall found that the Act did not grant exclusive federal jurisdiction over wildlife, but rather preempted only certain state authority to regulate stray wildlife on public lands.<sup>85</sup> The Court upheld previous case law which expounded that states and the Federal Government can maintain concurrent jurisdiction over federally owned lands.<sup>86</sup> But, the *Kleppe* court made it patently clear that, through the Property Clause, federal legislation overrode any conflicting state law.<sup>87</sup> The court therefore found that the Act did not infringe on the state's sovereignty.

*Kleppe* seemingly expanded the reaches of the Property Clause.<sup>88</sup> However, the central holding of *Kleppe* implies that the Clause did have some limits by noting "the furthest reaches of the power granted by the Property Clause have not yet been definitively resolved."<sup>89</sup>

### C. The Tenth Circuit's take on the Property Clause: *Wyoming v. United States*.

Twenty-three years after the Supreme Court handed down *Kleppe*, the Tenth Circuit was confronted with its own Property Clause challenge in *Wyoming v. United States*.<sup>90</sup> Like *Kleppe*, *Wyoming* centered around whether Congressional authority under the Property Clause allowed for regulation of wildlife on federal

80. See *Kleppe*, 426 U.S. at 547 (1976).

81. See *id.* at 540; see also *supra* Part II(A) (setting for case law that supports Property Clause with expansive powers).

82. *Kleppe*, 426 U.S. at 541.

83. See *id.* at 539.

84. See *id.* at 542.

85. See *id.* at 545.

86. See *id.* at 542.

87. See *id.*

88. See, e.g., Fishman & Williamson, *supra* note 60; Appel, *supra* note 26; Eid, *supra* note 29.

89. *Kleppe*, 426 U.S. at 539.

90. *Wyoming v. United States*, 279 F.3d 1214 (10th Cir.2002).

lands. *Wyoming* elaborated the Tenth Circuit's interpretation and application of *Kleppe*.<sup>91</sup> It is not surprising that the Tenth Circuit employed *Wyoming* to further underpin its reasoning in *County of Otero*. As such, *Wyoming* is examined below.

The issue in *Wyoming* stemmed from the construction of the National Wildlife Refuge System Improvement Act of 1997 (NWRISA).<sup>92</sup> The NWRISA set forth expansive regulation of wildlife on federal land; however the NWRISA was silent on the issue of the disease known as brucellosis.<sup>93</sup> Brucellosis is a bacterial disease that affects wildlife and cattle.<sup>94</sup> The contagious disease is perpetuated by "artificial concentration of elk during winter and early spring."<sup>95</sup> Brucellosis causes spontaneous abortion in newly infected animals and is thought to spread from elk to cattle.<sup>96</sup>

Fearing that brucellosis was a threat to the State's cattle industry,<sup>97</sup> the State of Wyoming began to vaccinate elk on state winter feed grounds.<sup>98</sup> This vaccination did seemingly show signs of effectively combatting incidents of brucellosis.<sup>99</sup> Thus, the State sought to expand the vaccination program by allowing vaccination of elk found on federally owned lands located within the State of Wyoming.<sup>100</sup> Specifically, the State sought to vaccinate elk in the National Elk Refuge ("NER"), which was part of the National Wildlife Refuge System.<sup>101</sup> The Governor of Wyoming wrote directly to the Director of the United States Fish and Wildlife Service, expressing the State's concern over negative impacts of brucellosis on the cattle industry, and requesting that the State be allowed to vaccinate elk on the NER. The Fish and Wildlife Service denied the Governor's request, stating that the adequacy of the vaccination program was doubtful.<sup>102</sup> Under this reasoning, the Fish and Wildlife Service would not authorize the State of Wyoming to vaccinate elk on the NER.<sup>103</sup>

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91. *See id.* at 1226–1228.

92. *See id.* at 1218.

93. *See id.* ("Unfortunately, the NWRISA does not (nor does any federal law) directly address the problem of brucellosis in wildlife.").

94. *See* Debra L. Donahue, *Trampling the Public Trust*, 37 B.C. ENVTL. AFF. L. REV. 257, 281 (2010).

95. *Id.*

96. *See Wyoming*, 279 F.3d at 1219.

97. United States Department of Agriculture certifies states as brucellosis-free or brucellosis-infected; a state found to be brucellosis-infected cannot export cattle without having it first tested, which incurs significant expenses. *See, e.g.,* *Fund for Animals, Inc. v. Lujan*, 962 F.2d 1391, 1402 (9th Cir. 1992) (recounting that Montana's loss of a brucellosis-free designation would cause the state \$2 million in testing annually). Robert B. Keiter & Peter H. Froelicher, *Bison, Brucellosis, and the Law in Greater Yellowstone Ecosystem*, 28 LAND & WATER LAW REVIEW 1, 4 (1993) (finding that the Department of Agriculture imposes "expensive testing and export limitations on cattle from [brucellosis] infected states.").

98. *See Wyoming*, 279 F.3d at 1220.

99. *See id.*

100. *See id.* at 1217.

101. *See id.* at 1217.

102. *See id.* at 1222.

103. *See id.* at 1214, 1222 (10th Cir.2002).

Following this “congressionally-legislated Federal-State standoff”<sup>104</sup> the State of Wyoming sought declaratory relief in federal court.

At the Tenth Circuit, the primary thrust of the State of Wyoming’s argument was that the Tenth Amendment reserved to the states the right to regulate wildlife.<sup>105</sup> Specifically, the State argued that the Property Clause did not withdraw all federal lands from state jurisdiction.<sup>106</sup> Relying heavily upon *Kleppe*, the *Wyoming* court dismissed this argument. The court found that “the Property Clause simply empowers Congress to exercise jurisdiction over federal lands within a state *if Congress so chooses*.”<sup>107</sup> The *Wyoming* court further explained that regulation of wildlife was historically a province of the states.<sup>108</sup> However, the court distinguished that this traditional authority over wildlife was not grounded in the Constitution. The court reasoned that “The Property Clause of the United States Constitution delegates to Congress (thus the Tenth Amendment does not reserve to the States) ‘the [p]ower to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States.’”<sup>109</sup> The Court underscored the Property Clause’s expansive power and the Clause’s preemptive effects on conflicting state law.<sup>110</sup> Citing to *Kleppe* for support, the *Wyoming* court found that federal legislation under the Property Clause not only regulated federal property itself, but the wildlife on it as well.<sup>111</sup> With this as a backdrop, the *Wyoming* court held that “The Tenth Amendment does not reserve to the State of Wyoming the right to manage wildlife, or more specifically vaccinate elk, on the NER, regardless of the circumstances.”<sup>112</sup>

### III. THE PRESENT CASE: UNITED STATES V. BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF OTERO

#### A. United States District Court for the District of New Mexico.<sup>113</sup>

At the district court, Otero County sought declaration that the County’s Resolution was a constitutionally-valid exercise of authority reserved to it by the Tenth Amendment, while the United States argued for injunction and declaration that the Resolution was preempted by the Federal Law.<sup>114</sup> Chief Judge Armijo denied Otero County’s Motion for Summary Judgment, while also simultaneously granting

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104. This is how the Tenth Circuit described the situation in the first sentence of the *Wyoming* opinion. *Id.* at 1218.

105. *See id.* at 1224.

106. *See id.* at 1226.

107. *Id.* at 1227 (emphasis added).

108. *See id.* 1214, 1226.

109. *Id.* at 1214, 1226 (quoting U.S. CONST. art. IV §3, cl.2).

110. *See id.* at 1216, 1227.

111. *See id.* at 1227.

112. *Id.* at 1227.

113. For background and facts of *County of Otero* see *supra* Part I(A).

114. *See* United States v. Bd. of Cty. Comm’rs of the Cty. of Otero, 184 F. Supp. 3d 1097, 1118 (D.N.M. 2015); *see also supra* note 18 and accompanying text for description of the Federal Law that preempted the Resolution.

the United States' Motion for Summary Judgment.<sup>115</sup> In a forty-one-page Memorandum Opinion and Order, Chief Judge Armijo set forth a thorough analysis of the case and rationale behind the district court's decision to grant Summary Judgment to the United States. The opinion's central analysis was organized into five parts: parts I and II pertained to the United States' standing in the case and justiciability;<sup>116</sup> part III explained the court's denial of a public interest group's Motion for Leave to File Brief *Amicus Curiae*;<sup>117</sup> part IV set forth the Court's reasons for denying Otero County's Motion for Summary Judgment and its reasoning for granting the United States' Motion for Summary Judgment against Otero County;<sup>118</sup> and part V explained the Court's reasoning for granting the United States' Motion for Summary Judgment against the State of New Mexico.<sup>119</sup> The reasoning underlying part IV formed the basis of Otero County's appeal to the Tenth Circuit and thus formed basis of the Court of Appeals' discussion. As such, only part IV will be explored below.

In its Motion for Summary Judgment, Otero County argued that the Resolution was constitutionally valid because it merely delegated to the County and State "the inherent police powers over federal lands that the Constitution already reserves to the states under the Tenth Amendment" and therefore "federal law does not supersede the [State Law] or [Resolution]." <sup>120</sup> Otero County Further argued that:

The Tenth Amendment reserves for the state and county certain inherent police powers to abate a nuisance or threat on federal lands and to protect the health, safety and welfare of New Mexico Citizens on federal lands and because the Property Clause does not grant Congress the Power to regulate federal lands when the regulation impedes New Mexico's sovereign police powers to protect its citizens on federal lands.<sup>121</sup>

Conversely, the United States argued that the Resolution conflicted with Federal Law that was grounded in the Property Clause.<sup>122</sup> Therefore, the argument followed that the Resolution violated the Supremacy Clause and was thus preempted by Federal Law.<sup>123</sup>

Essentially, the overarching issue before the district court was preemption. However, before the court could address this issue it first had to determine whether the United States had the authority to preempt the State Law and Resolution. In other words, the crux of the analysis before the court lay in determining federal authority. The answer for the court was the Property Clause.<sup>124</sup> Chief Judge Armijo began her Property Clause analysis by examining the delicate division of powers

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115. See *County of Otero*, 184 F. Supp. 3d at 1118.

116. See *id.* at 1106–1115.

117. See *id.* at 1115–1118.

118. See *id.* at 1118–1135.

119. See *id.* at 1135–1139.

120. *Id.* at 1118.

121. See *id.* at 1119.

122. See *id.*

123. See *id.*

124. See *id.* at 1118–1121 (setting forth the heart of the District Court's rationale that the Property Clause was plenary and did not reserve any Tenth Amendment authority to the states).

constitutionally delegated to the United States and those reserved for the states.<sup>125</sup> The court employed a two-part analysis. First, the court sought to answer whether Congress had the authority under the Property Clause to prevent Otero County from taking preventative measures to combat risks of fire. That question was answered in the affirmative, and the court then decided next if the Tenth Amendment reserved any remaining authority to Otero County. The court found that the Tenth Amendment did not.

The court couched its reasoning in Tenth Circuit precedent, notably finding that *Wyoming* was controlling.<sup>126</sup> Recall, the *Wyoming* decision found that plenary power under the Property Clause implicitly determined that the Tenth Amendment did not reserve to the states any authority to regulate wildlife on federal lands.<sup>127</sup> Based on *Wyoming*, the district court rejected Otero County's argument that the Tenth Amendment reserved any authority to abate a threat created on federal lands.<sup>128</sup> The district court supported this rejection by stating:

The State of Wyoming advanced the same argument that Otero County raises before this court: That the Tenth Amendment reserves for the States inherent sovereign authority to regulate land owned by the federal government, but within state borders, for the protection of the health safety and welfare of the states' citizens.<sup>129</sup>

The district court then emphasized that "[t]he *Wyoming* court's conclusion and its reasoning equally applies here."<sup>130</sup> Based on this reasoning the district court held that the Federal Government had the exclusive authority over federal lands pursuant to the Property Clause.<sup>131</sup>

Once the district court had established that the Property Clause granted the United States plenary authority to prevent Otero County from removing fire hazards from National Forest lands, the court had to next address the issue of whether the Federal Law preempted the State Law and Resolution. The court was able to find that, under the plenary authority bestowed by the Property Clause, there was conflict preemption.<sup>132</sup> In other words, the court found that the Resolution directly contravened federal regulation and undermined Congress' statutory scheme governing the National Forests.<sup>133</sup> Accordingly, the district court entered judgment in favor of the United States and found that the State Law and Resolution were unconstitutional. Otero County then appealed to the Tenth Circuit Court of Appeals.

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125. *See id.* at 1119.

126. *See id.* at 1120. The *Kleppe* decision was absent from the Court's main Property Clause Analysis.

127. *See supra* Part II(C).

128. *See County of Otero*, 184 F. Supp. 3d at 1121.

129. *Id.*

130. *Id.*

131. *See id.*

132. *See id.* at 1123. Conflict preemption occurs when "compliance with both federal and state regulations is an impossibility." *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142 (1963).

133. *See County of Otero*, 184 F. Supp. 3d at 1123, 1130.

## B. The Tenth Circuit.

The County fared no better at the Tenth Circuit. At the Tenth Circuit, Otero County focused its appeal solely on federal power under the Property Clause.<sup>134</sup> Otero County presented a more refined argument, focusing in on the scope of the Property Clause's power, rather than preemption or jurisdictional issues as it had at the district court.<sup>135</sup> In fact, the sole issue before the Tenth Circuit was whether the Property Clause's power was broad enough to abrogate all state power in such a capacity that a state could not under any circumstances remove destructive fire hazards from National Forest lands.<sup>136</sup> The court framed the issue similarly, beginning its discussion of the case by stating "There is no dispute that a local government can ordinarily exercise its police powers to mitigate fire danger within its territorial boundaries," the court continued, "The issue before us is solely one of constitutional power."<sup>137</sup>

Juxtaposed against the district court's expansive forty-one-page memorandum opinion, Circuit Judge Harris L. Hartz penned an eight-page opinion focused almost entirely on the Property Clause. Not unlike the district court, the Tenth Circuit indicated that precedent required rejection of Otero County's proffered narrow view of the Property Clause.<sup>138</sup> The Court began its analysis by citing *Kleppe v. New Mexico*.<sup>139</sup> As discussed previously, *Kleppe*—the cornerstone case used in deciding *Wyoming v. United States*—described the Property Clause as having broad powers including granting Congress the power to control and regulate wildlife on federal lands.<sup>140</sup> Much like the district court, the Tenth Circuit concentrated on parallels that could be drawn between Otero County's argument and the arguments advanced in *Kleppe*.<sup>141</sup> The Tenth Circuit underscored *Kleppe*'s reasoning that the Federal Government and state may share concurrent jurisdiction over land in a state but, "where those state laws conflict with . . . legislation passed pursuant to the Property Clause, the law is clear: The state laws must recede."<sup>142</sup> Next, the Tenth Circuit, largely mirrored the district court's reasoning, by relying on *Wyoming* to find further support for an expansive reading of the Property Clause.<sup>143</sup> The court then concluded by finding that the district court had properly rejected Otero County's arguments.

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134. See *United States v. Bd. of Cty. Comm'rs of Cty. of Otero*, 843 F.3d 1208 (10th Cir. 2016), *cert denied*, 138 S. Ct. 84 (U.S. 2017).

135. See Reply Brief for the Board of County Commissioners of County of Otero at 1, *United States v. Board of County Commissioners of County of Otero*, 843 F.3d 1208 (10th Cir. 2016), *cert denied* 2017 WL 1881715 (No. 01019595730), 2016 WL 1295825 at \*1.

136. See Appellants Opening Brief at 2, *United States v. Board of County Commissioners of County of Otero*, 843 F.3d 1208 (10th Cir. 2016), 2016 WL 241792 at \*2.

137. *County of Otero*, 843 F.3d at 1211.

138. See *id.* at 1212.

139. See *supra* Part II(B).

140. See *supra* Part II(B).

141. See *County of Otero*, 843 F.3d at 1213.

142. *Id.* (quoting *Kleppe v. New Mexico*, 426 U.S. 529 (1976)) (alteration in original).

143. See *County of Otero*, 843 F.3d at 1213.

Otero County appealed the decision to the Supreme Court of the United States but was denied certiorari on October 2, 2017.<sup>144</sup>

#### IV. THE RECENT REVIVAL OF THE TENTH AMENDMENT, FEDERALISM, AND LIMITS ON FEDERAL POWER

Federalism, the balance of power between the nation and the states, is a cornerstone of the United States Constitution. The framers sought to ratify a Constitution that succeeded where the Articles of Confederation failed: the creation of a strong national government.<sup>145</sup> However, while the framers wished to create a strong national government, they feared creating a government that was too powerful.<sup>146</sup> Thus, the framers adopted the Tenth Amendment to pacify fears that an all-powerful government would aggrandize itself at the expense of the states.<sup>147</sup> The Tenth Amendment provides: “The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”<sup>148</sup> This language embodies the Framers’ intent to limit federal power and protect the states from federal overreach.<sup>149</sup> In essence, the Tenth Amendment, as well as federalism as a whole, was intended to safeguard the states by “decreasing the likelihood of federal tyranny” and “enhancing democratic rule by providing government that is closer to the people.”<sup>150</sup>

In practice, the breadth of the Tenth Amendment has fluctuated throughout history.<sup>151</sup> While the Tenth Amendment was broadly construed at the beginning of the twentieth century,<sup>152</sup> the mid-twentieth century saw the United States Supreme Court take up the reverse position and find that the Tenth Amendment was merely a truism.<sup>153</sup> However, the 1976 case of *National League of Cities v. Usery*<sup>154</sup> revived the Tenth Amendment as a check on congressional power.<sup>155</sup> *National League of Cities* held that Congress violates the Tenth Amendment when it interferes with

144. See *Bd. of Cty. Com’rs of Cty. of Otero v. United States*, 138 S. Ct. 84 (U.S. 2017). It is appropriate here to echo the words of jurist and Supreme Court Justice Oliver Wendell Holmes: “The denial of writ of certiorari imports no expression of opinion upon the merits of the case.” *United States v. Carver*, 260 U.S. 482, 490 (1923).

145. See SULLIVAN & FELDMAN, *supra* note 29, at 77.

146. See *id.*

147. See *id.* at 78.

148. U.S. Const. amend. X.

149. See ERWIN CHEMERINKSY, *supra* note 29, at 77. (“The Court has used the Tenth Amendment as the basis for this protection of state governments from federal encroachment.”).

150. *Id.* at 126–127.

151. See, e.g., Erwin Chemerinksy, *The Rehnquist Revolution*, 2 PIERCE L. REV. 1, 12 (2004) (noting that Tenth Amendment was merely seen as a truism, not a limit on congressional power, from 1937 to 1976).

152. See, e.g., *Hammer v. Dagenhart*, 247 U.S. 251 (1918) (striking down federal laws prohibiting child labor on Tenth Amendment grounds) *overruled by* *U.S. v. Darby*, 312 U.S. 100 (1937).

153. See *Darby*, 312 U.S. at 124 (“The [Tenth] Amendment states but a truism that all is retained which has not been surrendered.”).

154. *Nat’l League of Cities v. Usery*, 426 U.S. 833 (1976), *overruled by* *Garcia v. San Antonio Metro. Transit Auth.*, 496 U.S. 528 (1985).

155. See Chemerinksy, *supra* note 151, at 13. (stating that since the *National League of Cities*, the Rehnquist Court “revived the Tenth Amendment as a constraint on Congress’ authority.”).

traditional functions of the state.<sup>156</sup> While *National League of Cities* was shortly overruled by *Garcia v. San Antonio Metropolitan Transit Authority*,<sup>157</sup> the decision nevertheless signaled a significant reversion back to a Tenth Amendment that limits congressional authority.<sup>158</sup> Indeed, while *Garcia* expressly overruled *National League of Cities*, the *Garcia* Court made it patently clear that “the Federal Government was designed in large part to protect the States from overreaching by Congress.”<sup>159</sup> In essence, the Tenth Amendment has since been used to form a common rule of construction: “narrow construction of federal power to interfere with matters believed best left under state control.”<sup>160</sup>

The Tenth Amendment’s upswing gained substantial traction through the 1990s, and its state-centered focus has passed from the Rehnquist Court to the modern Roberts Court.<sup>161</sup> During the 1990s the Court began to implement limits on congressional power. Cases such as *Gregory v. Ashcroft*,<sup>162</sup> *New York v. United States*,<sup>163</sup> *Printz v. United States*,<sup>164</sup> and *Alden v. Maine*<sup>165</sup> illustrate the Court’s focus on the Tenth Amendment and protection of state sovereignty. Justice Sandra Day O’Connor reiterated this focus when she stated:

The Tenth Amendment likewise restrains the power of Congress, but this limit is not derived from the text of the Tenth Amendment, which itself, as we have discussed, is essentially a tautology. Instead, the Tenth Amendment confirms that the power of the Federal Government is subject to limits that may, in a given instance, reserve power to the States.<sup>166</sup>

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156. *Usery*, 426 U.S. at 852.

157. *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1976).

158. See Erwin Chemerinsky, *supra* note 151, at 13.

159. *Garcia*, 469 U.S. at 551.

160. Kurt T. Lash, James Madison’s Celebrated Report of 1800: The Transformation of the Tenth Amendment, 74 GEO. WASH. L. REV. 165, 165 (2006).

161. See, e.g., ERWIN CHERMERINKSY, *supra* note 29, at 116 (“Since the 1990’s, the Court again has invalidated laws as exceeding the scope of Congress’s powers and violating the Tenth Amendment.”).

162. *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991) (upholding a state law that mandated retirement of state judges at age seventy because a state’s authority to set qualifications of state officials was reserved under the Tenth Amendment).

163. *New York v. United States*, 505 U.S. 144, 188 (1992) (holding that forcing a state to accept ownership of radioactive waste exceeded congressional power and was thus violative of the Tenth Amendment).

164. *Printz v. United States*, 521 U.S. 898, 936 (1997) (striking down federal legislation that commandeered state officials because such legislation was abhorrent to the Constitution’s division of authority).

165. *Alden v. Maine*, 527 U.S. 706, 759 (1999) (finding, in part, that state sovereign immunity could not be involuntarily waived because the Framers of the Constitution did not intend for “Congress [to] circumvent the federal design by regulating States directly when it pleases to do so.”).

166. *New York*, 505 U.S. at 157.

One of the greatest demonstrations of the Court limiting federal power came in the cases of *United States v. Lopez*<sup>167</sup> and *United States v. Morrison*.<sup>168</sup> Both *Lopez* and *Morrison* struck down federal statutes passed through Congress' Commerce Clause power. What makes these two cases remarkable is that they represent the Court's departure from a near sixty-year span of total congressional deference under the Commerce Clause; in that time, not a single piece of federal legislation was deemed to exceed Commerce Clause authority.<sup>169</sup>

In *Lopez*, the Court invalidated the Gun-Free School Zones Act, which forbid any individual from possessing a firearm near a school.<sup>170</sup> Congress passed the act under its Commerce Clause powers with the reasoning that firearm-related violence disrupts education, which in turn leads to a less productive society, which in turn affects commerce.<sup>171</sup> The Court rejected this reasoning stating that Congress' powers are to be interpreted in a limited capacity.<sup>172</sup> The Court found that allowing Congress' attenuated argument to pass muster under the Commerce Clause "would effectually obliterate the distinction between what is national and what is local and create a completely centralized government."<sup>173</sup>

In *Morrison*, the Court found the Violence Against Women Act to be unconstitutional.<sup>174</sup> That Act granted federal civil causes of action for victims of gender-motivated violence.<sup>175</sup> Like the Gun-Free School Zone Act in *Lopez*, Congress passed the Violence Against Women Act pursuant to its Commerce Clause power. The impetus of the Violence Against Women Act was preventing the economic costs associated with gender-motivated violence.<sup>176</sup> Like in *Lopez*, the Court struck down this reasoning.<sup>177</sup> The Court instead found that Congress could not "regulate noneconomic, violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce. The Constitution requires a distinction between what is truly national and what is truly local."<sup>178</sup>

Both *Lopez* and *Morrison* recognized the necessity to protect against federal overreach.<sup>179</sup> While *Lopez*'s and *Morrison*'s focus were on preventing Congress from exceeding its already expansive Commerce Clause powers, both opinions found issue with Congress' infringement on the states' fundamental police powers.

167. *United States v. Lopez*, 514 U.S. 549, 583 (1995) (finding that Tenth Amendment concerns were raised by congressional criminalization of guns within a school zone because such regulation "contradict[ed] the federal balance the framers designed and that [the] Court is obliged to enforce.") (Kennedy, J., concurring).

168. *United States v. Morrison*, 529 U.S. 528 (2000) (holding that the Commerce Clause did not enable Congress to enact civil remedies for crimes against women, and that Congress had exceeded its Constitutional limits).

169. See SULLIVAN & FELDMAN, *supra* note 29, at 142.

170. See *Lopez*, 514 U.S. at 551.

171. See *id.* at 564.

172. See *id.* at 557.

173. *Id.*

174. See *United States v. Morrison*, 529 U.S. 598, 627 (2000).

175. See *id.* at 601.

176. See *id.* at 613.

177. See *id.* at 627.

178. *Id.* at 671–618.

179. See SULLIVAN & FELDMAN, *supra* note 29, at 171.

For example, *Lopez* found that granting too much power to Congress under the Commerce Clause would unconstitutionally “convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States.”<sup>180</sup> Likewise, the *Morrison* Court stated that Congress could not regulate noneconomic, violent conduct based only on potential commerce effects because punishing crimes is a fundamental province of the states.<sup>181</sup> In fact, the Court there stated that it could “think of no better example of the police power, which the Founders denied the National Government and reposed in the States, than the suppression of violent crime and vindication of its victims.”<sup>182</sup>

The court recently expounded the necessity for states to retain their inherent police powers in *National Federation of Independent Business v. Sebelius*.<sup>183</sup> The Court there stated that “[b]ecause the police power is controlled by fifty different states instead of one national sovereign, the facets of governing that touch on citizens’ daily lives are normally administered by smaller governments closer to the governed.”<sup>184</sup> The Court noted that this was significant because “[t]he Framers thus ensured that powers which ‘in the ordinary course of affairs, concern the lives, liberties, and properties of the people’ were held by governments more local and more accountable than a distant federal bureaucracy.”<sup>185</sup> Finally, the Court underscored the importance of the states retaining their independent police power when it noted that the “independent power of the States also serves as a check on the power of the Federal Government: ‘by denying any one government complete jurisdiction over all the concerns of public life.’”<sup>186</sup>

The cases above exemplify the Court’s recent revival of the Tenth Amendment, the protection of state sovereignty, and federalism as a whole. While these principles have waxed and waned throughout history,<sup>187</sup> the current trend certainly indicates a Court that is more sensitive to the states’ fundamental police powers and cautious of the Federal Government amassing too much power.

## V. ANALYSIS OF UNITED STATES V. BOARD OF COUNTY COMMISSIONERS OF COUNTY OF OTERO

*County of Otero* presents an interesting situation in which a local government was effectively stripped of its ability to safeguard the health and safety of its residents from imminent and potentially catastrophic danger. The County’s police powers were usurped by the Federal Government under the authority of the Property Clause. The case presents notable interplay between the notion of dual

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180. *United States v. Lopez*, 514 U.S. 549, 567 (1995).

181. *See Morrison*, 529 U.S. at 618.

182. *Id.*

183. *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. 519 (2012).

184. *Id.* at 536.

185. *Id.* (quoting *The Federalist* No. 45, at 293 (J. Madison)).

186. *Id.* at 536 (quoting *Bond v. U.S.*, 564 U.S. 211 (2011)).

187. *See, e.g., New York v. United States*, 505 U.S. 144, 159 (1992) (The “jurisprudence in [the area of the Tenth Amendment] has traveled an unsteady path.”).

sovereignty central to federalism and the ultimate power of the Federal Government.<sup>188</sup>

When the lens of federalism is applied to the use of the Property Clause in *County of Otero*, glaringly obvious constitutional concerns arise. As contemplated below, the ostensibly expansive reaches of the Property Clause would grant Congress the ability to subsume a state or county's fundamental police power rights. Furthermore, the "checks and balances" guaranteed by the Constitution are effectively absent under the Property Clause jurisprudence when one considers the extensive judicial deference shown to Congress.<sup>189</sup> This federal abrogation of a state's police power and the lack of safeguards indicates that interpreting the Property Clause in an overly-expansive manner is completely abhorrent to the fundamental tenants of federalism, and more importantly, repugnant to the Constitution. When this is considered one is left to reasonably expect that although the Property Clause has repeatedly been described as nearly limitless, there has to be some boundary to its reach.

The following analysis will first look at why the Property Clause's limit should have been found in *County of Otero*. This will include an analysis on how the *Kleppe* and *Wyoming* decisions are distinguishable. Next, this Note will analyze how and why the Tenth Amendment should have preserved Otero County's inherent police powers. This Part of the Note will set forth why Otero County could have prevailed under the modern approach to the Tenth Amendment and federalism.

#### **A. The Property Clause should not have controlled in *County of Otero*.**

##### *1. County of Otero presents an unprecedented situation concerning fundamental police powers where a limit to the Property Clause could be found.*

In its Reply Brief, the County raised an interesting hypothetical: "[i]f an active fire was coursing through the Lincoln National Forest, approaching the lands and homes of New Mexico citizens, undoubtedly the State of New Mexico and the County would have some authority to enter onto National Forest lands to (attempt to) put out the fire."<sup>190</sup> In such a hypothetical, it would be absurd to find that the State or County was preempted by federal law from entering the national forest to combat the fire. However, the Property Clause and its expansive, limitless reach sets forth a logical syllogism that the Federal Government could indeed prevent the County from

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188. For more on the interplay between federalism and the Property Clause, see Eid, *supra* note 29. Professor Eid (now a federal judge sitting on the Tenth Circuit Court of Appeals) sets forth interesting postulates on how "new federalism" may limit Congress' ability to use the Property Clause to regulate in the environmental arena. *Id.* at 1250–1260; see also *People v. Rinehart*, 377 P.3d 818 (Cal. 2016), *cert. denied sub nom Rinehart v. California*, 138 S.Ct. 635 (2018) (finding that legislation enacted through the Property Clause could did not preempt state environmental laws).

189. See *Kleppe v. New Mexico*, 426 U.S. 529, 536 (1976) ("[W]e must be mindful that, while the courts must eventually pass upon them, determinations under the Property Clause are *entrusted primarily to the judgment of the Congress.*") (emphasis added).

190. Reply Brief for the Board of County Commissioners of County of Otero at 9, *United States v. Board of County Commissioners of County of Otero*, 843 F.3d 1208 (10th Cir. 2016), *cert. denied* 2017 WL 1881715 (No. 01019595730), 2016 WL 1295825 at \*6.

fighting the fire on federal lands.<sup>191</sup> In such an instance the County would not be allowed to protect its citizens and their property. Instead, the County and its citizens' only recourse would be to wait and hope that federal authorities would protect them.

Applying the logical conclusion of a limitless Property Clause to the hypothetical shows that the Property Clause could prevent a state or County from protecting its citizens—a fundamental police power and perhaps the most paramount duty of a sovereign.<sup>192</sup> A limitless Property Clause could therefore be deemed to grant the Federal Government the ability to strip a state of one of its most fundamental and inherent powers. However, as explained below this extreme conclusion had not been reached until *County of Otero*.

The facts of *County of Otero* present a unique divergence from the facts of previous Property Clause jurisprudence.<sup>193</sup> For example, seminal cases on the Property Clause have pertained to the Federal Government's ability to regulate wildlife,<sup>194</sup> regulate private conduct that occurs on private land that impacts federal land,<sup>195</sup> implement grazing laws,<sup>196</sup> and lease federal lands.<sup>197</sup> None of these cases have pertained to fundamental police powers.<sup>198</sup> This is where *County of Otero* distinguishes itself from other Property Clause case law. In *County of Otero*, Otero County implemented the Resolution<sup>199</sup> to remove hazardous, dry vegetation within Otero County.<sup>200</sup> The motivation for this was, of course, to mitigate the significant dangers of a forest fire harming the County and its citizens.<sup>201</sup> This was, then, a County merely seeking to exercise its police powers and protect its citizens. No part of the Resolution sought to undermine the Federal Government's sovereign control over federal lands.<sup>202</sup> When the case is understood in this light, the holding in *County of Otero* creates issues with the County's sovereignty. As such, the Tenth Circuit did not necessarily have to confine itself to Property Clause precedents as it did in *County of Otero*.<sup>203</sup> Instead, focus should have shifted to the County's right to invoke its fundamental police power of protecting its citizens. This focus invokes a thorough

191. See *supra* Part II (setting forth case law holding that the Property Clause is limitless).

192. See, e.g., U.S. CONST. amend X.; Nat'l Fed'n of Bus. v. Sebelius, 567 U.S. 519, 535–536 (2012) (emphasizing that the Framers “ensured that powers which ‘in the ordinary course of affairs, concern the lives, liberties, and properties of the people’ where held by governments more local and more accountable than a distant federal bureaucracy.”) (citing to *The Federalist* No. 45, at 293 (J. Madison)).

193. See *supra* Part II(A).

194. See *Kleppe v. New Mexico*, 426 U.S. 529 (1976); *Hunt v. United States*, 278 U.S. 96 (1928).

195. See *United States v. Alford*, 274 U.S. 264 (1927); *United States v. Camfield*, 167 U.S. 518 (1840).

196. See *Light v. United States*, 220 U.S. 523, 536 (1918); *United States v. Grimaud*, 220 U.S. 506 (1911).

197. See *United States v. City and County of San Francisco*, 310 U.S. 16 (1940);

198. See *Eid*, *supra* note 29 at 1247 (2004) (stating that one would have to “make a substantial expansion of the central holdings of [Property Clause] cases” to find that that Property Clause grants Congress general police powers).

199. See *supra* Part I(A) for full detail of the Resolution.

200. See *United States v. Bd. of Cty. Comm'rs of Cty. of Otero*, 843 F.3d 1208, 1211 (10th Cir. 2016), *cert denied*, 138 S. Ct. 84 (U.S. 2017).

201. See *id.* at 1210.

202. See *supra* Part I(A).

203. See *County of Otero*, 843 F.3d at 1212.

Tenth Amendment analysis, and invites the possibility that the interpretations of the Property Clause can be limited by the Tenth Amendment.

The question then becomes, where can the limit of the Property Clause be found? This Note neither defines nor attempts to discern where that bright line can be drawn. This Note does, however, submit a rather axiomatic yet important assertion: the limits of federal authority cannot be greater than, nor infringe upon, a state's constitutional authority. Indeed, Justice Antonin Scalia described this very same principle when he stated that “[w]hat is absolutely clear, affirmed by the text of the 1789 Constitution, *by the Tenth Amendment* ratified in 1791, and by the innumerable cases of ours in the 220 years since, is that there are structural limits upon federal power.”<sup>204</sup> What Justice Scalia was alluding to in that statement was that the Federal Government's power must recede when it runs afoul of the Tenth Amendment.

## 2. *Kleppe* and *Wyoming* can be distinguished from *County of Otero*.

### a. *County of Otero* is fundamentally different than *Kleppe* and *Wyoming*.

*Kleppe v. New Mexico*<sup>205</sup> and *Wyoming v. United States*,<sup>206</sup> were both central to the district court's and Tenth Circuit's decision in *County of Otero*.<sup>207</sup> The district court began its Property Clause analysis by stating “[o]ur Tenth Circuit's decision in *Wyoming v. United States* is controlling.”<sup>208</sup> Likewise, the Tenth Circuit began its analysis by stating that “binding precedent *requires* us to reject the [*Otero County's*] argument.”<sup>209</sup> Both the district court and Tenth Circuit in *County of Otero* read *Kleppe* and *Wyoming* to stand for the proposition that the Property Clause has expansive reaches in all instances.

The two cases complement each other; *Kleppe* informs and guides *Wyoming*, while *Wyoming* further defines *Kleppe's* holding.<sup>210</sup> This is not surprising as both *Kleppe* and *Wyoming* pertained to whether the Property Clause could be read in such a way to grant federal authority over animals found on federal lands.<sup>211</sup> Regulation of wildlife is undoubtedly a traditional power of the state,<sup>212</sup> but such a *traditional* authority is not a *fundamental* aspect of state sovereignty. *Kleppe* speaks directly to this: “No doubt it is true that as between a State and its inhabitants the

204. *NFIB v. Sebelius*, 567 U.S. 519, 647 (2012) (Scalia, J., dissenting) (emphasis added).

205. *Kleppe v. New Mexico*, 426 U.S. 529 (1976).

206. *Wyoming v. United States*, 279 F.3d 1214 (10th Cir. 2002).

207. *See supra* Part II.

208. *United States v. Bd. of Cty. Comm'rs of the Cty of Otero*, 184 F. Supp. 3d 1097, 1120 (D.N.M. 2015) (citation omitted).

209. *United States v. Bd. of Cty. Comm'rs of Cty. of Otero*, 843 F.3d 1208, 1212 (10th Cir. 2016), *cert denied*, 138 S. Ct. 84 (U.S. 2017) (emphasis added).

210. *See supra* Part II(B)–(C).

211. *Kleppe* centered around whether the Federal Government could regulate the manner in which wild horses and burros could be removed from federal lands. *See supra* Part II(B). *Wyoming* confronted the issue of whether wild elk could be vaccinated in order to prevent brucellosis. *See supra* Part II(C).

212. *See, e.g., Toomer v. Witsell*, 68 S. Ct. 1156 (U.S. 1948) (finding that the state traditionally has power over wildlife); *Lacoste v. Dep't of Conservation of State of Louisiana*, 44 S. Ct. 186 (U.S. 1924) (“Protection of the wild life of the state is peculiarly within the police power, and the state has great latitude in determining what means are appropriate for its protection.”).

State may regulate the killing and sale of wildlife, but it does not follow that its authority is exclusive of paramount powers.”<sup>213</sup> *Wyoming* likewise acknowledges this principle when the court stated “wildlife management is a field which the States have traditionally occupied.”<sup>214</sup> *Wyoming* even went a step further by asking—and answering in the negative—whether “the power to manage federal land within a State, including the wildlife thereon, ‘is an attribute of state sovereignty reserved by the Tenth Amendment, [and] necessarily a power the Constitution has not conferred on Congress.’”<sup>215</sup>

*County of Otero* did not concern regulation of wildlife. Instead, the case implicated the ability of a local government to protect the human health, safety, and welfare of its citizens. In essence, *County of Otero* concerned the right of Otero County to exercise its *fundamental* power. While the regulation of wildlife is deemed to be a traditional power of the state, that power is not fundamental and a state’s regulation of wildlife can constitutionally be superseded by federal regulation.<sup>216</sup> This is not true of a state’s police power. A state’s police power is fundamental.<sup>217</sup> As such, a state’s fundamental powers, such as protection of its citizens from danger, can be distinguished from its traditional powers.

Therein lies the fundamental difference between the facts of *County of Otero* and the facts of *Kleppe* and *Wyoming*. *Kleppe* and *Wyoming* addressed the concerns of states who sought to regulate wildlife found within their borders but on federally-owned land. Loss of regulation of wildlife deprives a state of a traditional function, but loss of that function does not directly affect the health, safety, and welfare of that state’s citizens. Moreover, inability to regulate wildlife may cause inconvenience to a state’s citizens or, at worst, economic damage to their property. The conditions in *County of Otero* presented substantially greater concerns than inconvenience or economic damage. The conditions in *County of Otero* presented hazardous circumstances in which Otero County had to thin out dangerous fire fuels that presented imminent destruction to its people. Forest fires, especially in the arid conditions of New Mexico, move incredibly fast and consume everything in their destructive path. Such destructive power necessarily invokes the need of a local government to exercise its police powers in order to defend its citizens. This is the fundamental right and function that Otero County sought to exercise; this is what distinguishes *Otero County* from *Kleppe* and *Wyoming*.

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213. *Kleppe v. New Mexico*, 426 U.S. 529, 545 (1976).

214. *Wyoming v. United States*, 279 F.3d 1214, 1231 (10th Cir. 2002).

215. *Id.* at 1226 (quoting *New York v. United States*, 505 U.S. 144, 156 (1992)).

216. *See, e.g.*, *Hughes v. Oklahoma*, 441 U.S. 332, 339 (1979) (finding that state regulation of animals must also be consistent with federal regulation).

217. *See, e.g.*, *Bond v. United States*, 134 S.Ct. 2077, 2086 (U.S. 2014) (“The States have broad authority to enact legislation for the public good—what we have often called ‘police power.’ The Federal Government, by contrast, has not such authority and ‘can exercise only the power granted to it.’” (quoting *McCulloch v. Maryland*, 4 Wheat. 316, 405 (U.S. 1819)); *Nat’l Fed’n of Bus v. Sebelius*, 567 U.S. 519, 536 (2012) (“Our cases refer to this general power of governing, possessed by the States but not by the Federal Government, as the ‘police power.’”)).

b. *Kleppe* was decided when the Tenth Amendment was still seen as a truism.

*Kleppe*, the seminal Property Clause case granting Congress broad powers, was decided in 1976. While *Kleppe* was decided close to the Court's decision in *National League of Cities v. Usury* (which indicated a shift toward the revival of Tenth Amendment)<sup>218</sup> it is more than a decade removed from *Gregory v. Ashcroft*.<sup>219</sup> *Gregory* has been seen as the beginning of the Court consistently implementing the Tenth Amendment and federalism as rules of construction to protect the states.<sup>220</sup> Indeed, *Gregory* emphasized this by reasoning that the states constitutionally retain "numerous and indefinite" powers while the Constitution creates a Federal Government of limited powers.<sup>221</sup> If *Kleppe*'s holding truly supports a limitless federal power under the Property Clause, then its holding is squarely at odds with the principles emphasized in *Gregory* and the Tenth Amendment cases that followed. *Gregory*'s reasoning is not isolated, it stands in a long line of recent cases that indicated a Court that was willing to use the Tenth Amendment and federalism to shield the states and limit the federal power.<sup>222</sup> Obviously, *Kleppe*, decided in 1976, predates these pivotal cases.

While this Case Note's focus is on *County of Otero*, it is nevertheless helpful and important to understand that *Kleppe* could have been decided differently if facts giving rise to it occurred after the Tenth Amendment's revival. If the Supreme Court decided *Kleppe* under the modern approach to the Tenth Amendment, *Kleppe* could have had a different outcome. In essence, *Kleppe* embodies an anachronistic approach to balancing power between the Federal Government and the states. Since *Kleppe*, the Court's approach to the Tenth Amendment, state sovereignty, and federalism has changed. As scholars have remarked, Tenth Amendment case law has since seen a common rule of construction: "narrow construction of federal power to interfere with matters believed best left under state control."<sup>223</sup> *Kleppe* cuts against this narrow rule because it allows for broad congressional powers to interfere with regulation of wildlife—a traditional power of the state.

When the Tenth Circuit relied on *Kleppe* in *County of Otero* it stated it did so because *Kleppe*'s binding precedent required it to do so.<sup>224</sup> Indeed, the Tenth Circuit court was judicially bound to follow the Supreme Court's decision.<sup>225</sup> If the Tenth Circuit had a Property Clause case underpinned by a more modern approach to state sovereignty, then *County of Otero* could have been decided differently. Thus, even if the Tenth Circuit properly relied on *Kleppe*, it nevertheless was forced to rely

218. See *supra* note 158 and accompanying text.

219. *Gregory v. Ashcroft*, 501 U.S. 452 (1991).

220. See ERWIN CHERMERINKSY, *supra* note 29, at 217 ("The first indication of the revival of the Tenth Amendment occurred in *Gregory v. Ashcroft*.").

221. *Gregory*, 501 U.S. at 457.

222. See *supra* notes 161–169 and their accompanying text.

223. Lash, *supra* note 160, at 176.

224. *United States v. Bd. of Cty. Comm'rs of Cty. of Otero*, 843 F.3d 1208, 1212 (10th Cir. 2016), *cert denied*, 138 S. Ct. 84 (U.S. 2017) ("binding precedent requires us to reject the [Otero County's] argument.").

225. See, e.g., *Hutto v. Davis*, 454 U.S. 370, 375 (1982) ("precedent of this Court must be followed by the lower federal courts no matter how misguided the judges of those courts may think it to be").

on a case which lacked the Court's modern approach of balancing power between the states and Federal Government.

### **B. The Tenth Amendment should have protected Otero County.**

While the Tenth Amendment was the thrust of Otero County's main argument before the Tenth Circuit,<sup>226</sup> the depth of the Court of Appeal's Tenth Amendment analysis spanned two pages of its opinion.<sup>227</sup> This seems terse, especially considering the recent breadth of the Tenth Amendment's power. The Tenth Amendment's power has ebbed and flowed throughout history, but it is widely accepted that the Tenth Amendment currently enjoys a broad interpretation by the Court.<sup>228</sup> The Supreme Court's current approach to the Tenth Amendment recognizes that any intrusion on the Tenth Amendment is significant and any interference with state sovereignty "contradicts the federal balance the Framers designed and that [the] Court is obliged to enforce."<sup>229</sup> Because this is the current approach, it is necessary to analyze Tenth Amendment, state sovereignty, and federalism concerns raised by *County of Otero*.

#### *1. Reading the Property Clause in a manner that prevented Otero County from exercising its protective police power was abhorrent to the Tenth Amendment.*

A sovereign's protection of its citizens and their property is an essential and paramount function of a government. Such an important function was recognized at the inception of this nation and has been repeatedly upheld.<sup>230</sup> In fact, the Tenth Circuit alluded to such importance in the first sentence of its legal analysis in the *County of Otero* opinion when it stated that a "local government can ordinarily exercise its police powers to mitigate fire danger within its territorial boundaries."<sup>231</sup> The Tenth Amendment is in place specifically to protect such important functions; its placement in the Constitution is understood to prevent the National Government from amassing too much power.<sup>232</sup> The Amendment "leaves to the several States a

226. See Reply Brief for the Board of County Commissioners of County of Otero at 9, *United States v. Board of County Commissioners of The County of Otero*, 843 F.3d 1208 (10th Cir. 2016), *cert denied* 2017 WL 1881715 (No. 01019595730), 2016 WL 1295825 at \*7.

227. See *United States v. Bd. of Cty. Comm'rs of Cty. of Otero*, 843 F.3d 1208, 1212-1214 (10th Cir. 2016), *cert denied*, 138 S. Ct. 84 (U.S. 2017).

228. See, e.g., Chemerinsky, *supra* note 151, at 12; Lash, *supra* note 160, at 175.

229. *United States v. Lopez*, 514 U.S. 549, 583 (1995) (Kennedy, J., concurring).

230. See, e.g., Alexander Hamilton, Federalist No. 32, *Federalist Papers* at 137 (The "necessity of local administration for local purposes would be a complete barrier against the oppressive use of such power."); *Nat'l Fed'n of Bus. v. Sebelius*, 567 U.S. 519, 536 (2012) (reaffirming that police power should be controlled by the fifty different states rather than one national government).

231. See *United States v. Bd. of Cty. Comm'rs of Cty. of Otero*, 843 F.3d 1208, 1211 (10th Cir. 2016), *cert denied*, 138 S. Ct. 84 (U.S. 2017).

232. See, e.g., *United States v. Darby*, 312 U.S. 100, 124 (1941) (stating that adoption of the Tenth Amendment was to "allay fears that the new national government might seek to exercise powers not granted, and that the states might not be able to exercise their reserved powers."); Andrzej Rapczynski, *From Sovereignty to Process: The Jurisprudence of Federalism After Garcia*, 1985 SUP. CT. REV. 341, 380 (finding that the framers implemented the protections of federalism in order to prevent a federal tyranny).

residuary and inviolable sovereignty.”<sup>233</sup> Thus, when a local government is stripped of its ability to protect its citizens’ lives and property, there are implicit Tenth Amendment concerns—if not full-blown constitutional violations. Those very same concerns present themselves in the facts giving rise to *County of Otero*. Indeed, the Tenth Amendment comprised a significant thrust of Otero County’s argument before the trial and appellate courts.<sup>234</sup> The courts in *County of Otero* essentially deemed that federal power under the Property Clause was so extensive that it could preclude Otero County from taking any defensive measures against the imminent and conflagratory devastation of massive wildfires. Otero County and its citizens were rendered defenseless against the death and destruction of a wild fire. Such an instance of a local government being stripped of fundamental powers begs for the protection of the Tenth Amendment.

The Tenth Amendment provides that the Federal Government has only those powers specifically given to it by the Constitution.<sup>235</sup> When the Tenth Amendment is at issue, the Supreme Court has found that one of two inquiries must be answered. The first is “if a power is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any reservation of that power to the states.”<sup>236</sup> The other inquiry is “if a power is an attribute of state sovereignty reserved by the Tenth Amendment, it is necessarily a power the Constitution has not conferred on Congress.”<sup>237</sup> *County of Otero* presents no clear-cut answer as to which inquiry is appropriate. On one hand, the Property Clause specifically delegates to Congress the authority to “dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States.”<sup>238</sup> *Kleppe, Wyoming*, and other Property Clause case law has read the Property Clause to have expansive and broad reaches.<sup>239</sup> Indeed, this is what convinced the district court to reject Otero County’s Tenth Amendment argument,<sup>240</sup> and likewise persuaded the Tenth Circuit.<sup>241</sup> On the other hand, it is undeniable that Otero County’s police power is “an attribute of state sovereignty reserved by the Tenth Amendment” which would necessarily mean that it is a power the “Constitution has not conferred on Congress.”<sup>242</sup> When these two inquiries are balanced, it is easy to understand the constitutional dilemma created by *County of Otero*. But, these inquiries must be examined through the lens of recent interpretations of the Tenth Amendment. For

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233. James Madison, Federalist No. 39, at 245.

234. See *supra* Part II; see also Petition for Writ of Certiorari at 32-37, Board of County Commissioners of the County of Otero v. U.S., 86 USLW 3133 (U.S. 2017) (No. 16-135), 2017 WL 22000284, at \*32-37 (outlining Otero County’s Tenth Amendment Argument).

235. See U.S. CONST. amend. X.

236. *New York v. United States*, 505 U.S. 144, 156 (1992).

237. *Id.*

238. U.S. CONST., art IV, § 3, cl.2.

239. See *supra* Part II.

240. *United States v. Bd. of Cty. Comm’rs of the Cty. of Otero*, 184 F. Supp. 3d 1097, 1103 (D.N.M. 2015) (stating “[t]he Property Clause grants congress plenary power over federal lands and the Tenth Amendment does not reserve for New Mexico or its counties and exclusive police power over federal lands.”).

241. See *United States v. Bd. of Cty. Comm’rs of Cty. of Otero*, 843 F.3d 1208, 1212 (10th Cir. 2016), *cert denied*, 138 S. Ct. 84 (U.S. 2017).

242. *New York v. United States*, 505 U.S. 144, 156 (1992).

example, the Supreme Court has recently declared that the balance of “national powers and state sovereignty are intertwined. While neither originates in the Tenth Amendment, both are expressed by it. Impermissible inference with state sovereignty is not within the enumerated powers of the National Government, and action that exceeds the National Government’s enumerated powers undermines the sovereign interests of States.”<sup>243</sup> Such declaration illustrates perfectly the current approach of the Tenth Amendment as affording the states broad protections against federal intrusion.<sup>244</sup>

When the Court’s modern approach to state sovereignty is applied to *County of Otero* the answer to the two-part inquiry set forth above becomes clearer. The Court has repeatedly emphasized that the federal power cannot reach into the provinces of the states.<sup>245</sup> The Framers “explicitly chose a Constitution that confers upon Congress the power to regulate individuals, not states.”<sup>246</sup> Thus, the current emphasis on curbing federal power, before it intrudes on the states, indicates that Otero County’s intention to protect its citizens by clearing fire hazards is “an attribute of state sovereignty reserved by the Tenth Amendment.”

## 2. *The balance of federalism was destroyed in County of Otero.*

The concept of federalism was destroyed in *County of Otero*. The Tenth Amendment embodies federalism, which among other things, seeks to prevent the Federal Government from amassing too much power.<sup>247</sup> Without the protections of the Tenth Amendment the balance necessary to the goals of federalism is critically endangered. Chief Justice Roberts recently underscored the importance of balancing the scheme of federalism to ensure that all fifty states maintain their fundamental police powers.<sup>248</sup> The Chief Justice explained that the Constitutional powers conferred on Congress “must be read carefully to avoid creating a general federal authority akin to the police power.”<sup>249</sup>

Otero County is comprised of seventy-five percent federal land.<sup>250</sup> This means that, under the Property Clause, the Federal Government has plenary, ultimate authority over three quarters of Otero County.<sup>251</sup> This essentially precludes Otero County from exercising its police power within a majority of its jurisdiction. Practically speaking, this means that Otero County is powerless from mitigating the destructive potential of fires that could originate on seventy-five percent of the land within its borders. This comes dangerously close to granting the Federal Government the very same general police power that Chief Justice Roberts condemned.

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243. *Bond v. United States*, 564 U.S. 211, 255 (2011).

244. *See supra* Part IV.

245. *See supra* notes 162–168 and accompanying text.

246. *Printz v. United States*, 521 U.S. 898, 920 (1997).

247. *See SULLIVAN & FELDMAN, supra* note 29, at 77.

248. *See Nat’l Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 536 (2012) (noting that the Framers ensured a government where states controlled police power, not a signal national sovereign).

249. *Id.* at 536.

250. *See United States v. Bd. of Cty. Comm’rs of Cty. of Otero*, 843 F.3d 1208, 1210 (10th Cir. 2016), *cert denied*, 138 S. Ct. 84 (U.S. 2017).

251. While this number is high, it pales in comparison to other places such as Nevada, where the Federal Government owns 80% of the state. *See, VINCENT ET AL., supra* note 27.

In *Camfield v. United States*, the Court alluded to the fact that the Property Clause grants some police power analogous to the states' police powers.<sup>252</sup> The *Camfield* court explained this was a necessary effect of the Property Clause because a "different rule would place the public domain of the United States completely at the mercy of state legislation."<sup>253</sup> *Camfield* was implying the balance of federalism because it was acknowledging the dangers of allowing too much power to be amassed by the state. In *County of Otero*, the exact inverse principle occurred: the state was placed at the complete mercy of Congress. This illustrates that not only was the balance of federalism skewed, it was destroyed as all police power was found to reside with the Federal Government. Otero County was not seeking to encroach on federal sovereignty, it was merely seeking to protect its citizens by acting within the sphere of its already existing fundamental police powers.

## VI. CONCLUSION

As fires rage across the country, wildfires are increasingly becoming a national concern.<sup>254</sup> These wildfires obliterate landscapes, destroy property and homes, and ultimately cause human casualties. When such dangers present themselves, it is incumbent upon a sovereign to protect its citizens. The Framers knew that a sovereign could best protect its citizens if police power was evenly balanced between the Federal Government and the states.<sup>255</sup> Indeed, the Framers sought to create a government where police powers "were held by governments more local and more accountable than a distant federal bureaucracy."<sup>256</sup> Such a balance of police powers is essential to federalism. That balance was obliterated in *County of Otero*.

The Property Clause has been consistently held to have broad powers.<sup>257</sup> *Kleppe* and *Wyoming* conformed to this broad interpretation and formed the basis of the Tenth Circuit's opinion in *County of Otero*. However, the Property Clause's broad powers should have been limited in *County Otero* because never before had the Property Clause been used to wrest fundamental police powers away from a state. Moreover, even the enormous powers of Property Clause must be limited by the Tenth Amendment. An interpretation to the contrary is abhorrent to the Tenth Amendment and is not supported by modern Tenth Amendment jurisprudence.

For these reasons, Otero County's fundamental police powers should have been shielded from federal intrusion.

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252. *Camfield v. United States*, 167 U.S. 518, 525 (1897).

253. *Id.*

254. See U.S. DEP'T OF AGRIC., *supra* note 3.

255. See Nat'l Fed'n of Bus. v. Sebelius, 567 U.S. 519, 535–536 (2012).

256. *Id.* at 535.

257. See *supra* Part II.